AmFinance Bhd v Pembinaan Sistem Laju Sdn Bhd & Ors

HIGH COURT (MELAKA) — SUIT NO MT1–22–103 OF 2003
LOW HOP BING J
7 JUNE 2007

Civil Procedure — Setting aside — Judgment in default — Time frame ascribed 30-day — Delay of application — Shifted from the original address — Whether explanation given reasonable — Whether stringent requirement under O 42 r 13 must be adhered to — Rules of the High Court 1980 O 42 r 13

This was the second and third defendants' appeal against the decision of the learned registrar who had dismissed with costs their respective summons in chambers which sought, inter alia, to set aside the plaintiff's judgment against them in default of appearance. They were the guarantors who jointly and severally guaranteed repayment to the plaintiff all sums of money together with interest, costs and charges payable by the first defendant under the equipment lease agreement. The judgment in default of appearance was served on the second and third defendants on 25 March 2004 by way of prepaid registered post at their respective addresses as stated in the guarantee agreement. Three months later ie, on 23 June 2004, they filed an application to set aside the judgment.

Held, dismissing defendants' appeal:

The second defendant was contractually bound to notify the plaintiff of any change of address. His unilateral change of address, in breach of cl 7.04, was a wilful omission which must not be construed as assisting him in the evasion of his contractual obligations. Otherwise, this will open the floodgates for defaulting parties to employ his own wilful omission to overcome his own breach, thereby rendering a written agreement as mere verbiage. The court could not accept this as a reasonable explanation (see para 21).

[Bahasa Malaysia summary

Ini merupakan rayuan defendan kedua dan ketiga terhadap keputusan pendaftar yang menolak dengan kos saman dalam kamar mereka yang memohon antara lain, mengenepikan penghakiman plaintif terhadap mereka di dalam keingkaran kehadiran. Mereka adalah penjamin bersesama dan berasingan di dalam pembayaran balik kepada plaintif kesemua wang termasuk faedah, kos dan bayaran lain perlu bayar oleh defendan pertama di dalam perjanjian penyewaan peralatan. Penghakiman ingkar kehadiran diserahkan kepada defendan kedua dan ketiga pada 25 Mac 2004 melalui pos berdaftar bayar dahulu ke alamat mereka seperti yang tertera didalam

perjanjian jaminan. Tiga bulan kemudiannya, iaitu pada 23 Jun 2004, mereka memfailkan permohonan mengenepikan penghakiman tersebut.

Diputuskan, menolak rayuan defendan-defendan:

Defendan kedua terikat secara kontrak untuk memaklumkan plaintif tentang pertukaran alamat. Tindakan pertukaran alamat satu pihak, adalah suatu perlangaran terhadap klausa 7.04, merupakan meninggalkan dengan sengaja yang tidak boleh ditafsirkan sebagai membantunya di dalam pengenepian tanggungjawab kontraknya. Jika sebaliknya, ianya akan membuka peluang kepada pihak engkar memilih untuk membuat peninggalan sengaja bagi mengelak keengkaran sendiri, lalu menjadikan sesuatu perjanjian bertulis seolah-olah hanya perkataan yang berjela-jela. Mahkamah tidak dapat menerima perkara ini sebagai penjelasan yang munasabah (lihat perenggan 21).]

Notes

For a case on judgment in default, see 2(1) *Mallal's Digest* (4th Ed, 2002 Reissue) para 2262.

Cases referred to

Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223 (refd)
Koperasi Belia Nasional Bhd v Storage Enterprise (Port Kelang) Sdn Bhd [1998] 3 MLJ 209 (refd)
Malayan Banking Bhd v Mahmood Zuhdi Hj Mohd Noor [2001] 6 MLJ 209 (refd)
Ng Han Seng & Ors v Scotch Leasing Sdn Bhd (appointed receivers and managers) [2003] 4 MLJ 647 (refd)

Legislation referred to

Rules of the High Court 1980 O 13 rr 1, 8, O 42 r 13

TT Leong (Tunku Amiruddin & KK Chew) for the plaintiff.
Francis Goh (Francis Goh & Co) for the second and third defendants.

Low Hop Bing J:

APPEALS

[1] The two appeals before me are encl (41) and encl (43) filed by the appellants who are defendants 2 and 3 ('D2 and D3'). They have appealed against the decision of the learned registrar who had on 7 January 2005 dismissed with costs their respective summonses in chambers which sought inter alia to set aside the plaintiff's judgment against them in default of appearance. D3 agrees to be bound by the outcome of the appeal filed by D2.

FACTUAL BACKGROUND

[2] Pursuant to an equipment lease agreement executed between the plaintiff and the first defendant ('D1') on 31 July 1996 ('the agreement'), D1 agreed to lease from

A the plaintiff one unit of air compressor and one unit of reconditioned Casagrande Drill Rig (collectively 'the equipment') for a total consideration of RM515,070 repayable in 36 monthly instalments of RM14,308 each, the final instalment being RM14,290, subject to the terms and conditions contained therein, including charges, expenses and costs.

B

[3] DD2 and 3 are the guarantors who have executed a guarantee dated 31 July 1996 in favour of the plaintiff ('the guarantee'), in which DD2 and 3 jointly and severally guaranteed repayment to the plaintiff of all sums of money together with interest, costs and charges payable by D1 under the agreement.

C

[4] Upon D1's default under the agreement, the plaintiff had on 5 September 2000 effected repossession of the equipment at the cost of RM40,000.

[5] Upon the resale of the equipment and after deducting all expenses incurred
D under the agreement, there was an outstanding sum of RM375,696.26 as at 26 May 2003, which the plaintiff now claims against the defendants.

[6] The plaintiff vide solicitors' letter dated 30 May 2003 demanded payment of the said sum as at 26 May 2003, but the defendants had failed, refused and/or
E neglected to pay. Hence, this claim by the plaintiff against the defendants.

[7] On 20 December 2003, the plaintiff had obtained judgment in default of appearance ('the judgment') which was served on DD2 and 3 on 25 March 2004 by way of prepaid registered post at their respective address given by them as stated in
F the guarantee.

[8] Three months later ie, on 23 June 2004, DD2 and 3 filed and served encll (16) and (19) ('both the applications') respectively in order to set aside the judgment.

G **[9]** On 7 January 2005, both the applications were dismissed with costs by the learned registrar.

DELAY

H **[10]** It was submitted by learned counsel Ms TT Leong for the plaintiff that both the applications filed by DD2 and 3 were out of time, as prescribed under O 42 r 13 of the Rules of the High Court 1980 ('O 42 r 13') and that their explanation of having shifted from the original address given by them in the guarantee is insufficient, as under the guarantee they were obliged to inform the plaintiff of the
I change of address. Support was sought in:

(1) *Malayan Banking Bhd v Mahmood Zuhdi Hj Mohd Noor* [2001] 6 MLJ 209 (HC);

(2) *Ng Han Seng & Ors v Scotch Leasing Sdn Bhd (appointed receivers and managers)* [2003] 4 MLJ 647 (CA);

(3) *Koperasi Belia Nasional Bhd v Storage Enterprise (Port Kelang) Sdn Bhd* [1998] 3 MLJ 209 (CA); and

(4) *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 (CA).

[11] Learned counsel Mr Francis Goh contended for D2 that they were no longer staying at the address stated in the plaintiffs writ and that they were informed by the plaintiff of this action against them in May 2004 and subsequently on 21 June 2004, when the plaintiffs solicitors, in response to enquiries by D2's solicitors, informed D2's solicitors of the judgment. This submission has been rejected by the learned registrar.

[12] In my judgment, the answer to the above rival submissions is to be found by a close examination of O 42 r 13 and the relevant portion of cl 7.04.

[13] Order 42 r 13 where relevant merits reproduction as follows:

> 13. Setting aside... judgments and orders (O 42 r 13)
>
> Where in these rules provisions are made for the setting aside... of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

[14] Order 13 r 8 empowers the court to set aside any judgment for a liquidated demand when the defendant fails to enter appearance after the time limited for appearing under O 13 r 1. The 30 day time frame prescribed under O 42 r 13 would apply to D2's application to set aside the judgment.

[15] Order 42 r 13 has been construed in a number of judgments, to which I shall now refer.

[16] In *Malayan Banking Bhd*, Suriyadi J (now JCA) dismissed the defendant's application to set aside a judgment in default of appearance, on the ground that it was made more than six years after the time frame prescribed in O 42 r 13. The learned judge held that the stringent requirement under O 42 r 13 must be adhered to.

[17] A two month delay in filing the application for setting aside the judgment in default of appearance under O 42 r 13 also resulted in its dismissal by the Court of Appeal through the judgment of Zainun Ali J (now JCA) in *Ng Han Seng*.

[18] In *Koperasi Belia Nasional*, the application to set aside an ex parte order was made more than the 30 days prescribed in O 42 r 13. In the court of first instance, I dismissed that application as the facts disclosed that the defendant's solicitor's absence was due to the clerk's mistake in not recording the date on which the solicitor was supposed to be present, as a result of which default judgment was entered against

A the defendant. There was no explanation for the delay in making the application under O 42 r 13. On appeal, the Court of Appeal in three separate judgments unanimously upheld my decision.

[19] In *Khor Cheng Wah*, the Court of Appeal, speaking through Gopal Sri Ram
B JCA, set out the settled principles as follows:

(1) In a matter which essentially involves the exercise of discretion, it is desirable to have the views of the tribunal in whom the law vests that primary discretion;

(2) When a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura*
C *subveniunt,* though having its origin in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant;

(3) In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it.
D Whether the explanation in a given case is satisfactory depends upon the circumstances of each case. In a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion; and

(4) It is not a reasonable explanation for a defendant to say that he had placed the
E conduct of his defence in the hands of a solicitor who did little to protect his interests.

[20] For a proper exercise of discretion under O 42 r 13, I now revisit the salient facts before me. D2 had explained that he had changed his address, but had not
F notified the plaintiff. In the guarantee, D2 has given his address as '30 Jalan Jejawi, Taman Bandaraya, 59100 Kuala Lumpur'. That was the address stated in the plaintiffs writ and also for the purpose of effecting service of legal processes by the plaintiff on D2. The judgment was sent by prepaid registered post to D2 at this address.

G Clause 7.04 where reads:

> … we hereby further agree that the service of any … legal process in respect of any action arising out of or connected with the Guarantee may beeffected by forwarding a copy of the … legal process by prepaid registered post to our respective addresses abovewritten or to
H such other addresses as may from time to time be notified by us to the lessor for that purpose …

[21] Under cl 7.04, D2 is contractually bound to notify the plaintiff of any change of address. His unilateral change of address, in breach of cl 7.04, is a wilful omission
I which must not be construed as assisting him in the evasion of his contractual obligations. Otherwise, this will open the floodgates for defaulting parties to employ his own wilful omission to overcome his own breach, thereby rendering a written

agreement as mere verbiage. I am unable to accept this as a reasonable explanation. In the circumstances, I hold that the learned registrar was right in refusing to exercise his discretion in favour of D2, and so there should be no appellate interference.

CONCLUSION

[22] On the foregoing grounds, I dismiss D2's appeal with costs and affirm the learned registrar's decision.

Appeal dismissed with costs.

Reported by Ashgar Ali Ali Mohamed